No. 90-1657

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In the Supreme Court of the United States

OCTOBER TERM, 1991

COMMONWEALTH OF MASSACHUSETTS, ET AL., PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Nuclear Regulatory Commission properly construed its regulations to exclude from licensing hearings certain testimony about potential consequences of hypothetical radiological emergencies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. (I) 1-129) is reported at 924 F.2d 311. The decisions of the Nuclear Regulatory Commission (Pet. App. (I) 130-201; Pet. App. (II) 1-140) are reported at 31 N.R.C. 197 and 31 N.R.C. 219.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1991. The petition for writ of certiorari was filed on April 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Nuclear Regulatory Commission (NRC) exercises "broad regulatory authority over the development of nuclear

energy." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 526 (1978). See Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*; Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.* A utility company that wishes to construct a nuclear power plant must make detailed health, safety, and environmental submissions to the NRC staff, which reviews the submissions and participates as an independent party in the permitting and licensing process. The NRC's three-member Atomic Safety and Licensing Boards conduct adjudicatory hearings on contested issues. The three-member Atomic Safety and Licensing Appeal Board hears appeals from those decisions. The NRC Commissioners have discretion to undertake further review. See 10 C.F.R. Pt. 2.

The NRC requires that applicants for operating licenses provide detailed plans for coping with radiological emergencies on the plant site and for ensuring offsite emergency preparedness. 10 C.F.R. 50.34(b)(6)(v); 10 C.F.R. Pt. 50, App. E. In particular, the applicant must submit emergency response plans prepared by state and local governments whose jurisdictions lie within designated emergency planning zones surrounding the plant. 10 C.F.R. 50.33(g). In the case of full power licensing, the NRC has provided by regulation that emergency planning must provide "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. 50.47(a). After a required review by the Federal Emergency Management Agency, the NRC and its adjudicatory boards evaluate emergency plans under 16 planning standards promulgated by the Commission. 10 C.F.R. 50.47(b). Failure to meet these standards generally will result in the NRC's denying an operating license, but the NRC's regulations give the applicant an opportunity to demonstrate that the license should nevertheless issue where,

for example, the "deficiencies in the plans are not significant for the plant in question." 10 C.F.R. 50.47(c)(1).

2. In 1973, the Public Service Company of New Hampshire (PSCNH) applied for a construction permit to build a pressurized water nuclear reactor (known as the Seabrook Station) south of Portsmouth, New Hampshire, within a few miles of the Massachusetts border. As part of the licensing process for full power operations, the NRC's Atomic Safety and Licensing Board considered the adequacy of the New Hampshire Radiological Emergency Plan (NH Plan), which sets an emergency response plan for the Seabrook Station. In the course of the lengthy adjudicatory proceedings on the adequacy of the NH Plan, petitioner Massachusetts sought to introduce evidence of estimated dose consequences to segments of the public that might result from certain hypothesized accidents. The Licensing Board excluded the evidence on the ground that it was not relevant to review of response plans under the NRC's emergency planning rule. Pet. App. (I) 13-16.

Petitioners appealed the exclusion to the Atomic Safety and Licensing Appeal Board, which certified the question to the NRC. The NRC determined that the text of its emergency planning regulations, its rulemakings on emergency planning, and its adjudicatory decisions interpreting those regulations established that the adequacy of an offsite emergency plan is to be judged solely upon the basis of its conformity with the 16 planning standards set forth in 10 C.F.R. 50.47(b). Pet. App. (I) 130-201.[1] That

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[1] The NRC explained that "consideration of specific accident sequences and their potential dose consequences has been rendered unnecessary by the promulgation of generic guidance [the 16 mandatory standards] that incorporates and synthesizes data on a range of accidents and their consequences." Pet. App. (I) 190-191. The NRC pointed out that its regulatory approach achieves the goal of reducing dose consequences by requiring that the applicant demonstrate core planning of

same day, the NRC issued a decision authorizing the issuance of a full power license for the Seabrook Station, subject to further NRC review of certain licensing issues. Pet. App. (II) 1-140.

3. The court of appeals affirmed the NRC's authorization of Seabrook's full power license and specifically upheld the exclusion of Massachusetts' evidence on hypothesized accidents. Pet. App. (I) 1-129. The court recognized that the scope of its review of the "final" agency action at issue here—the NRC's determination that the full power license could become immediately effective—was "exceedingly limited" and "properly confined to determining whether the Commission abused its discretion." *Id.* at 43-44. It ruled that the NRC's interpretation of its emergency planning regulation is consistent with the language of the regulation and not otherwise contrary to law. *Id.* at 86. The court had "little difficulty" in concluding that Massachusetts' evidence was properly excluded as inconsistent with the NRC's regulatory methodology and standards for evaluating the adequacy of an emergency plan. *Id.* at 86-88. The court also noted that under NRC regulations petitioners might have proffered their evidence on particular accident scenarios to support a request for a waiver of the NRC's ordinary approach to emergency planning, but petitioners made no such request. *Id.* at 89-91.

ARGUMENT

Petitioners contend that the NRC misinterpreted and misapplied its emergency planning regulation, 10 C.F.R.

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implementable measures that will permit a flexible response to an actual accident. *Id.* at 188-197. It saw little value in judging the adequacy of a plan against predictions of possible consequences of specific hypothetical accident sequences—which can vary widely in nature, degree and release characteristics, and by differences in weather, time of year, and time of day. *Id.* at 189-193, 198-199.

50.47, in excluding Massachusetts' evidence concerning hypothesized nuclear accidents. The court of appeals correctly rejected that contention. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, nor does it otherwise warrant this Court's review.

1. Petitioners argue that provisions of the emergency planning rule stating that the NRC must find "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency," 10 C.F.R. 50.47(a)(1), require adjudication of Massachusetts' hypothetical dose reduction evidence. As the court of appeals recognized, however, "section 50.47 'make[s] no reference to specific conditions or accident sequences.'" Pet. App. (I) 59. Paragraph (a) states "the general goal of the regulatory scheme for emergency planning" and "'* * * sets forth a general standard that envisions judgment and implies discretion.'" *Ibid.* "Paragraph (b) then enumerates specific standards that a response plan 'must meet,' presumably for the purpose of achieving the goals of adequacy and implementability." *Ibid.* See *San Luis Obispo Mothers for Peace* v. *NRC*, 789 F.2d 26, 31, 43 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986). The court's conclusion is bolstered by other provisions of the emergency planning rule, see 10 C.F.R. 50.47(a)(2), (c)(1), and (d), which clearly indicate "that the core of the Commission's inquiry is compliance with the generic standards of paragraph (b)," Pet. App. (I) 60, and not an *ad hoc* evaluation of the plan's effectiveness in particular accident situations.[2]

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[2] The court of appeals properly recognized that the NRC's licensing decisions "are generally entitled to the highest judicial deference because of the unusually broad authority that Congress delegated to the agency under the Atomic Energy Act." Pet. App. (I) 54 (citing *Carstens* v. *NRC*,

2. Petitioners contend that the NRC's interpretation of its regulation is inconsistent with statements that the Commissioners made in 1980, during the emergency planning rulemaking. Pet. 15-19. As the court of appeals correctly found, the transcript does not contradict the NRC's interpretation of its rule. Pet. App. (I) 74-77. That part of the rulemaking record shows only that the "overall goal of emergency planning is reasonable and feasible dose reductions under the circumstances, a proposition reiterated in the Commission's ruling, see CLI-90-2, 31 N.R.C. at 216-217." *Id.* at 75. While petitioners are correct that the Commissioners chose to use the word "adequate" rather than "effective" or "appropriate" to describe the protection provided by the emergency planning regulation, they did not reveal any clear consensus on the precise meaning of "adequate," and they certainly did not mandate the testing of a specific plan against the projected dose reductions of specific accident scenarios.[3]

742 F.2d 1546, 1551 (D.C. Cir. 1984), cert. denied, 471 U.S. 1136 (1985)). Judicial deference is especially appropriate where the court reviews the agency's interpretation of its own regulations. See, *e.g.*, *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1175 (1991). A reviewing court "will not overturn the Commission's interpretation of its own * * * rule 'unless that interpretation is plainly inconsistent with the language of the regulation.'" Pet. App. (I) 53 (quoting *San Luis Obispo Mothers for Peace* v. *NRC*, 789 F.2d at 30).

[3] Commissioner Bradford, who originally suggested a change to "effective" protective measures, acknowledged that "it is going to be very hard for anybody to extract from the four different sets of Commissioner remarks anything that they can use very definitively." Pet. App. (III) 84. He also recognized that a plan need not "be found inadequate just because you know that there are going to be some periods of time when you can't do that which you would really like to be able to do whether because of the conditions of the accident or the conditions of the weather." *Id.* at 73.

3. Petitioners also contend that the court of appeals has permitted the NRC to adopt and apply a "new rule." Pet. 30. That contention overlooks the consistency of the NRC's construction of its rule with other prior decisions and pronouncements. For example, the NRC justified the adoption of a 15-minute notice requirement in 1980 by explaining that "there may never be an accident requiring using the 15-minute notification capability," but "no single accident scenario should form the basis for choice of notification capability requirements," and "[e]mergency plans must be developed that will have the flexibility to ensure response to a wide spectrum of accidents." 45 Fed. Reg. 55,402, 55,407 (1980). Similarly, in amending its emergency planning regulation in 1987, the Commission stated that "emergency plans are evaluated for adequacy without reference to numerical dose reductions which might be accomplished." 52 Fed. Reg. 42,078, 42,085 (1987).[4]

4. Petitioners suggest that the NRC's 1980 Authorization Act, see Act of June 30, 1980, Pub. L. No. 96-295, § 109, 94 Stat. 783-785, directed the NRC to test an emergency plan against projected dose consequences of particular hypothetical scenarios. Pet. 12-15. As the court of appeals explained, the Act required the NRC to issue standards for emergency response plans and to provide that compliance with such plans was a condition for an operating license, but Congress "left to the NRC's discretion the

[4] By the same token, there is no merit to petitioners' contention that the NRC's interpretation is entitled to diminished deference by virtue of the supposed change in NRC's position. Pet. 31-33. The cases that petitioners cite in support of that contention—*Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932); *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); and *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977)—are inapposite where, as here, the agency has followed a consistent course.

specific requirements of emergency planning." Pet. App. (I) 66. See *Id.* at 63-66. The NRC's emergency planning regulation fulfilled that duty.

5. The NRC's reliance upon compliance with the 16 planning standards, while excluding dependence upon projected consequences of specific accident sequences, is a reasonable approach to planning for emergencies that covers a wide spectrum of probabilities and consequences. Petitioners criticize that approach on the ground that the NRC's interpretation involves nothing more than a *pro forma* checklist and "does not provide reasonable assurance of any level of public protection." Pet. 24 n.6. The court of appeals found, however, that "[f]ar from applying an uncritical checklist methodology, the Licensing and Appeal Boards exhibited a reasoned evaluation of the adequacy and implementability of the plan's compliance with the paragraph (b) standards." Pet. App. (I) 84-85.[5] The NRC has properly exercised its responsibility for assuring the adequacy of emergency planning in connection with the Seabrook Station, and petitioners' objections raise no issue warranting this Court's review.

[5] As the court of appeals noted, the Licensing Board examined numerous specific issues as to the adequacy of Seabrook's offsite emergency plans, including, for example, the accuracy of a survey to identify persons with special transportation needs and the accuracy of evacuation time estimates for advanced life support patients in hospitals. Pet. App. (I) 17-22. Indeed, the record in this case includes hundreds of pages of adjudicatory decisions on dozens of litigated issues regarding compliance with the emergency planning regulations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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